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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ADAM WYNN TINGLEY,

Plaintiff(s),

vs.

DR. R. BRUCE BANNISTER, et al.

Defendant(s).

Case No. 3:14-cv-000358 MMD-VPC

**OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT**

1. COMES NOW, Plaintiff, ADAM WYNN TINGLEY, by and through the undersigned counsel, and hereby files the following Response in Opposition to the January 29, 2016 Defendant's Motion for Summary Judgment (Doc. 66) (hereinafter "Defendant's Motion").

2. This Opposition is made and based upon all of the pleadings and records on file for this proceedings together with every exhibit that is mentioned herein or attached

hereto (each of which is incorporated by this reference as though it were set forth hereat in haec verba), if any there be, as well as the points and authorities set forth directly hereinafter.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STANDARD OF REVIEW

3. Pursuant to Federal Rule of Civil Procedure (“FRCP”) 56, an order granting summary judgment should be issued only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). An issue of material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

4. The Defendants, while acting under color of Nevada law, deprived the Plaintiff of his Eighth Amendment right to be free from cruel and unusual punishment, as secured by the Constitution. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).

5. The Plaintiff’s suffering was caused by the Defendants delay of and denial of medical care. This delay and denial was serious enough to constitute cruel and unusual punishment in violation of the Plaintiff’s Eighth Amendment rights. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Prison officials are deliberately indifferent to a prisoner’s serious

1 medical needs when they "deny, delay, or intentionally interfere with medical treatment."  
2  
3 *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1984). A prisoner's Eighth  
4 Amendment rights are violated when two requirements are met: (1) The deprivation alleged  
5 must be objectively, "sufficiently serious," where the inmate must show that he is  
6 incarcerated under conditions posing a substantial risk of serious harm; and (2) The official  
7 must be subjectively aware of that risk and act with deliberate indifference to inmate health  
8 or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 and 839-840 (U.S. 1994).  
9  
10

11 6. The Defendants, by their actions and/or inactions described below, were  
12 deliberately indifferent to the Plaintiff's serious medical needs. The "deliberate  
13 indifference" rule applies to physical, dental, and mental health. *Hoptowit v. Ray*, 682 F.2d  
14 1237, 1253 (9th Cir. 1982). The deliberate indifference towards the Plaintiff's serious  
15 medical needs was manifested by the Defendants in their written and oral responses to the  
16 Plaintiff's complaints about his serious medical needs, by the Defendant corrections officers  
17 and staff denying or delaying access to medical care by ignoring the Plaintiff's repeated  
18 requests for surgery, and then for postoperative medication, by the fact that the Defendants  
19 knew that the Plaintiff had not received the necessary postoperative medication as directed  
20 by his doctor, and refused to provide such medications in a timely manner despite the pleas  
21 of the Plaintiff and from his doctor. *Estelle v. Gamble*, 429 U.S. 97, 104-105 (U.S. 1976).  
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23  
24  
25

## 26 II. FACTS

27 7. The Plaintiff was incarcerated or on parole at various Nevada Department of  
28

1 Corrections (“NDOC”) prisons in Nevada from 2004, until he was last released in June of  
2  
3 2015. The Plaintiff was finally discharged without parole from NDOC on June 19th 2015.  
4 (See Exhibit 14)

5  
6 8. The Defendants have admitted that they are or were employees of the (Exhibit  
7 1 page 2 lines 7-8) as follows: Defendant Dr. R. Bruce Bannister was employed by NDOC  
8 as Medical Director; Defendant Sue Hoffman is and was at all relevant times employed by  
9 the Nevada Department of Corrections at Warm Springs Correctional Center (“WSCC”) as  
10 a Correctional Nurse; Defendant Kari McCullah is and was at all relevant times employed  
11 by the Nevada Department of Corrections at WSCC as a Correctional Nurse; and  
12 Defendant John Perry is and was at all relevant times employed by NDOC at WSCC as  
13 Director of Nursing Services.  
14  
15

16  
17 9. While the Plaintiff was held in the custody of NDOC, the Plaintiff suffered  
18 from a condition of the eye called “pterygium.” Pterygium is a painful condition of the eye  
19 where the scleral conjunctiva invades the cornea, leading to obscured vision, redness,  
20 inflammation, and a feeling that a foreign object had invaded the eye. Failure to properly  
21 treat pterygium can lead to permanent eye disfigurement, pain, and vision problems,  
22 including corneal scarring and blindness in varying degrees. (See Exhibit 2)  
23  
24

25 10. The Plaintiff has properly disclosed his treating Ophthalmologist (See Exhibit  
26 3) Dr. Thomas Komadina as a non-retained expert witness. At the November 4, 2015  
27 deposition of Dr. Komadina, described the Plaintiff’s pterygium as follows:  
28

Well, typically, they have a light sensitivity. Sometimes as in this case, they'll have diminished vision, which he had a fairly significant vision loss. They oftentimes will have chronic irritation on their eye and redness associated with the pterygium.

Q: Could the symptoms of a pterygium be debilitating?

A: Yes.

Q: Okay. Do you believe in Mr. Tingley's case when you saw him at this time that his symptoms were debilitating?

A: Not only debilitating, but sight-threatening. (Exhibit 4 at page 9 line 18).

11. In 2004, the Plaintiff saw an NDOC doctor, who told Plaintiff that he had pterygium in his left eye and needed eye surgery. The Plaintiff sought treatment for his eye at this time because his eye was dry and he felt a constant feeling of having a foreign object in his eye. (Exhibit 14) As indicated at Tingley Initial Discl. Bates No. 18 in Exhibit 5, which are excerpts from the "Physician's Orders" in Plaintiff's medical chart, there is a note dated February 17, 2004 indicating, "Eye clinic - pterygium obstructing...."

12. From early 2004 to 2006, the Plaintiff repeatedly requested surgery to treat his pterygium, but NDOC officials, including Dr. Bannister, repeatedly denied the Plaintiff's surgery requests.<sup>1</sup> From February 2004 through June 2006, Plaintiff's pain increased and

<sup>1</sup> Below are summaries of the requests made by the Plaintiff in Kites in Exhibit 9 between August 30, 2004 and October 18, 2006, seeking medical treatment or medication for his eye condition: 08/30/04 I need to see the Ophthalmologist Tingley Initial Discl. Bates No. 110; 09/24/04 I need refill on eye drops. I'm having increasing pain. Tingley Initial Discl. Bates No. 109; 01/12/05 I watched the eye Dr. write a prescription for Acular at my visit 4 weeks ago. He also said he would RUSH it. What Happened???? Tingley Initial Discl. Bates No. 108; 02/20/05 I was told by medical staff that my prescription would be here soon. That was a month ago. Tingley Initial Discl. Bates No. 107; 03/26/05 Still waiting for Acular Tingley Initial Discl. Bates No. 106; 04/04/05; 12/24/05 Please re-fill eye drops Tingley Initial Discl. Bates No. 198; 02/22/06 I need to see the eye Dr. please. Tingley Initial Discl. Bates No. 191; 04/12/06 Have I been approved for eye surgery? Tingley Initial Discl. Bates No. 277; 4/12/06 UR Panel denied surgery again. Tingley Initial Discl. Bates No. 277; 05/23/06 I need Pred Forte and Wet Tears. Tingley Initial Discl. Bates No. 189; 06/28/06 Still waiting for Pred Forte. Tingley Initial Discl. Bates No. 186; 09/03/06 Dr. Fisher told me about his 2 recommendations that may allow me to regain some of my vision again. What is the next step? Tingley Initial Discl. Bates No. 184; 09/11/06 I need appointment with Dr. Fisher. Tissue is growing back and I'm in pain. Tingley Initial Discl. Bates No. 185; 09/28/06 I would like to be seen by Dr. Fisher. I have some questions that Dr. Snyder could not answer. Tingley Initial Discl. Bates No. 183; 10/18/06 My eye is causing me a lot of pain! Please schedule me with Dr. Gedney or Dr. Fisher. Tingley Initial Discl. Bates No. 182; and 10/18/06 Please re-fill eye drops. Tingley Initial Discl. Bates No. 182.

1 ultimately he lost all sight in his left eye. (See Exhibit 14) Despite having personal  
2 knowledge of the Plaintiff's eye problems, Dr. Bannister continued to deny the Plaintiff's  
3 surgery requests from the Plaintiff, Dr. Karen Gedney, and other medical personnel.  
4 Attached hereto as Exhibit 6 are the Utilization Review Panel ("UR Panel") documents  
5 disclosed by NDOC. The Plaintiff made the following requests to the UR Panel before his  
6 eye surgery in in July of 2006:  
7  
8

- 9 a. On September 10, 2004 Dr. Scott referred the Plaintiff for surgery,  
10 stating that the Plaintiff had a "large pterygium left eye causing blind"  
11 (Exhibit 6 NDOC No. 0262). This request was disapproved by the UR  
12 Panel on September 14, 2004.
- 13 b. On December 21, 2004, Dr. Gedney referred the Plaintiff for eye  
14 surgery stating that the condition significantly affected the Plaintiff's  
15 quality of life. (Exhibit 6 NDOC No. 0275). The UR Panel did not  
16 respond to this request in the document in the Plaintiff's possession
- 17 c. On April 5, 2006, Dr. Gedney again referred the Plaintiff for surgery  
18 stating that the condition significantly affected the Plaintiff's quality of  
19 life and that if surgery were delayed the Plaintiff could require a corneal  
20 transplant. Dr. Gedney also notes, "Blindness lt eye." The UR panel  
21 approved the request, but directed the surgery to occur after July 1,  
22 2006. (Exhibit 6 NDOC No. 0268). On the same document, the  
23 Plaintiff's discharge date is noted as June 3, 2006, before his surgery was  
24 to be scheduled.

25 13. In June 2006, Dr. Fisher, an outside ophthalmologist, saw Plaintiff and stated  
26 that Plaintiff's eye was in the worst condition that Dr. Fisher had ever seen. (See Tingley  
27 Initial Discl. Bates No. 46 in Exhibit 8, which are the records from the Plaintiff's first  
28 surgery). Dr. Fisher later commented that the Plaintiff "continues to ow scar tissue in the  
visual axis which is due, to the extensive pterygium and the length of time that it was  
there." (See Tingley Initial Discl. Bates No. 44 in Exhibit 8).

1           14. On July 12, 2006, Dr. Fisher operated on Plaintiff and prescribed eye drops  
2  
3 that were essential to the Plaintiff's recovery. *Id.* Two weeks after this surgery, the Plaintiff  
4 saw Dr. Fisher again and Dr. Fisher stated that the Plaintiff "should remain on his  
5 Tobradex four times a day for four more weeks and see me in a month." (See Tingley Initial  
6 Discl. Bates No. 45 in Exhibit 8)  
7

8           15. After the July 12, 2006 surgery, NDOC refused to give and/or delayed  
9 providing the Plaintiff with necessary postoperative eye drops and Plaintiff's first surgery  
10 failed. (See Exhibit 14) As shown in Exhibit 10 at Tingley Initial Discl. Bates No. 000386,  
11 the first record of NDOC ordering postoperative eye drops for the Plaintiff was not until  
12 July 25, 2006, and he did not receive his drops until August 2, 2006. For reasons explained  
13 in greater depth below, i.e. the deposition of Dr. Komadina, it is reasonable to conclude  
14 that this denial of postoperative drops after this first surgery did at least contribute to the  
15 failure of this surgery and the subsequent return of the Plaintiffs eye condition.  
16  
17

18           16. On November 27, 2007, Dr. Fischer noted the return of the Plaintiff's  
19 pterygium, "As you know he underwent pterygium excision with a graft in July of 2006. He  
20 returned to see me on 11/27/2007. There appears to be regrowth of the vessels into the  
21 scar tissue." (See Tingley Initial Discl. Bates No. 43 in Exhibit 8 and Exhibit 14)  
22  
23

24           17. After the Plaintiff's symptoms noticeably resurfaced the Plaintiff started to  
25 experience pain and again made multiple requests to NDOC, of which Dr. Bannister was  
26  
27  
28



1 aware, for another surgery by filing numerous kites<sup>2</sup> and by requesting that the UR Panel

2

3 <sup>2</sup> Below are summaries of the requests made by the Plaintiff in Kites in Exhibit 9 between July 30, 2008 and December

4 15, 2014, seeking medical treatment or medication for his eye condition: 06/30/08 I'm running out of eye drops. Eye Dr.

5 increased my dosage to 4 times a day, not just one bottle per month. Tingley Initial Discl. Bates No. 176; 07/07/08. The

6 eye Dr. recommended I go back to Dr. Komadina again. Will they send me? Tingley Initial Discl. Bates No. 175;

7 07/29/08 Am I still scheduled to see Dr. Komadina? Tingley Initial Discl. Bates No. 173; 08/30/08 Please re-fill eye

8 drops. Tingley Initial Discl. Bates No. 172; 09/10/08 I am having problems with my left eye still. I am having a lot of

9 pain. Tingley Initial Discl. Bates No. 171; 09/22/08 Please re-fill eye drops. Tingley Initial Discl. Bates No. 170;

10 11/18/08 I am once again running out of my eye drops and still waiting for re-fill. Please re-fill. Tingley Initial Discl.

11 Bates No. 167; 03/04/09 I have more questions for the eye Dr. Tingley Initial Discl. Bates No. 163; 04/13/09 Have

12 my eye drops (Pred Forte) come in yet? They were ordered 4 weeks ago. Tingley Initial Discl. Bates No. 160; 05/02/09

13 What happened to my Pred Forte? These were ordered almost 2 months ago! Tingley Initial Discl. Bates No. 156;

14 05/11/09 I've had an "As Needed" prescription for eye drops written by Dr. Gedney, so what has happened? Tingley

15 Initial Discl. Bates No. 159; 06/26/09 I was moved to another unit and the officers came and took my eye drops... A

16 week ago, how do I get more? Tingley Initial Discl. Bates No. 155; 09/20/09 I'm out of eye drops, please re-fill. Tingley

17 Initial Discl. Bates No. 150; 10/25/09 I'm running low on eye drops, please re-fill. Tingley Initial Discl. Bates No. 148;

18 11/09/09 The eye that was operated on is getting bad again. I need to see eye Dr. please. I am experiencing pain. Tingley

19 Initial Discl. Bates No. 147; 11/15/09 Please schedule me with eye Dr. I am having problems with my eye and cannot

20 wait 2 months for appointment. Tingley Initial Discl. Bates No. 129; 11/16/09 Please re-fill eye drops my eye has been

21 giving me a lot of problems lately. Tingley Initial Discl. Bates No. 146; 12/04/09 Was my eye apt. changed? Tingley

22 Initial Discl. Bates No. 290; 12/06/09 I need re-fill on eye drops. Tingley Initial Discl. Bates No. 285; 12/07/09 I am

23 having severe pain in my eye almost unbearable. Dr. Bannister ordered me as needed IBU's. Why can I not get these?

24 Tingley Initial Discl. Bates No. 128; 12/29/09 I just want to confirm I've been scheduled for eye Dr. visit. I was

25 originally scheduled for eye Dr. on 11/9/9 Tingley Initial Discl. Bates No. 284; 01/13/10 I need re-fill on eye drops

26 Tingley Initial Discl. Bates No. 139; 01/25/10 Well it's been more than 2 months since I was told I was scheduled to be

27 seen by eye Dr. Am I still scheduled? Tingley Initial Discl. Bates No. 132; 01/29/10 I was just seen by yet another eye

28 Dr. Surgery was denied on my left eye until I was blind. Tingley Initial Discl. Bates No. 1214; 02/22/10 The Dr. I seen

back in Jan. told me I was going to be sent back to NNCC because of eye problems. What happened? Tingley Initial

Discl. Bates No. 127; 03/24/10 I need to see Dr. Gedney about pain in my eye. Tingley Initial Discl. Bates No. 126;

06/07/10 When am I going to be seen by Dr. Gedney? eye drops and prescriptions have long since expired and I'm in

pain and it's getting worse. Tingley Initial Discl. Bates No. 118; 08/18/11 I need eye drops re-filled. Tingley Initial Discl.

Bates No. 130; 08/30/11 Last week the nurse brought my eye drops and said she would bring my pain meds the next

day.. that was a week ago. What happened to her? Tingley Initial Discl. Bates No. 274; 01/11/12 Please re-fill eye drops.

Tingley Initial Discl. Bates No. 272; 02/28/12 Please re-fill eye drops. Tingley Initial Discl. Bates No. 271; 06/04/12

Please re-fill eye drops. Tingley Initial Discl. Bates No. 270; 07/12/12 Please re-fill eye drops. Tingley Initial Discl. Bates

No. 269; 08/24/12 Please schedule me with eye Dr. my rt. Eye is giving me problems. Tingley Initial Discl. Bates No.

267; 09/10/12 Please re-fill eye drops. Tingley Initial Discl. Bates No. 266; 10/03/12 Please re-fill eye drops. Tingley

Initial Discl. Bates No. 265; 12/04/12 Please re-fill eye drops. Tingley Initial Discl. Bates No. 263; 01/25/13 I need to

see the eye Dr. please Tingley Initial Discl. Bates No. 262 01/26/13 I need to see eye Dr. My rt. Eye is now experiencing

slight pain like left eye did. I do not want to go completely blind while I'm in prison Tingley Initial Discl. Bates No. 261;

03/13/13 I am still waiting for eye drops. Tingley Initial Discl. Bates No. 253; 04/04/13 Please re-fill eye drops. Tingley

Initial Discl. Bates No. 249; 04/15/13 Will the UR Panel and Dr. Bannister finally approve corneal transplant by Dr.

Komadina. Tingley Initial Discl. Bates No. 248; 4/15/13 kite to medical to cancel apt with Dr. Fisher, that it would do

no good, he would just refer to Komadina again. Tingley Initial Discl. Bates No. 247; 04/16/13 Instead of surgery on my

right eye would UR Panel finally agree to fixing my left eye destroyed by DOC waiting too long. Tingley Initial Discl.

Bates No. 247; 04/19/13 Letter to Dr. Bannister. Tingley Initial Discl. Bates No. 276/246; 04/25/13 Please re-fill eye

drops. Tingley Initial Discl. Bates No. 244; 05/11/13 Please re-fill eye drops. Tingley Initial Discl. Bates No. 243;

05/30/13 Please re-fill eye drops. Tingley Initial Discl. Bates No. 242; 06/10/13 Have I finally been re-scheduled to go

back to Dr. Komadina? Tingley Initial Discl. Bates No. 241; 06/16/13 Eye Dr. ordered eye drops for pain over 2 weeks

ago. Has this been filled yet? Tingley Initial Discl. Bates No. 240; 06/16/13 Please re-fill eye drops. Tingley Initial Discl.

Bates No. 239; 06/20/13 Have I been approved for eye surgery? Tingley Initial Discl. Bates No. 238; 06/24/13 I have

been waiting for 3 weeks now for approval from Dr. Bannister for my latest prescription eye drops for pain. How long

until I receive them? Tingley Initial Discl. Bates No. 237; 07/01/13 Please re-fill eye drops Tingley Initial Discl. Bates

No. 236. 07/05/13 Still waiting for Ketorolac. Tingley Initial Discl. Bates No. 235; 07/08/13 Please re-fill eye drops.

Tingley Initial Discl. Bates No. 234; 07/11/13 Have I been approved to go back to Dr. komadina yet? Tingley Initial



1 approve as much.

2  
3 18. The record shows that the UR Panel, again, denied and/or delayed getting the  
4 Plaintiff the treatment he needed for his eye for years:

- 5  
6 a. On June 26, 2008, Dr. Gedney requested UR panel approval for the  
7 Plaintiff to see Dr. Komadina because the “pterygium which was  
8 removed 1 yr ago. now scarring. optometrist recommends Dr.  
9 Komadina.” The UR Panel disapproved this request on July 15, 2008  
10 without explanation (Exhibit 6 NDOC No. 0232).  
11 b. On January 29, 2010, Dr. Aranas requested UR Panel approval for the  
12 Plaintiff to see an ophthalmologist. The UR Panel responded on March  
13 2, 2010 by directing that the Plaintiff be transferred to NNCC to be  
14 seen by Dr. Fischer. (Exhibit 6 NDOC No. 0229)  
15 c. On March 4, 2013, “V. VanHornal” requested that the Plaintiff be  
16 referred to Dr. Fischer due to his pterygium. The UR Panel responded  
17 on March 12, 2013 by approving the request. (Exhibit 6 NDOC No.  
18 0065)  
19 d. On June 19, 2013, Dr. Gedney then requested that the Plaintiff be  
20 referred to Dr. Komadina for his failed pterygium surgery. The UR  
21 Panel responded on June 25, 2013 by deferring the request back to Dr.  
22 Gedney. On September 23, 2013, Dr. Gedney responded by stating, “I  
23 am not an eye specialist UR needs to send pt to Dr. Komadina or deny  
it.” (Exhibit 6 NDOC No. 0053)

18 19. Dr. Bannister, as a member of the UR Panel, again delayed and/or denied the  
19 Plaintiff's requests for a second surgery for years. The Plaintiff was told on multiple  
20 occasions that it was Dr. Bannister who was denying his requests for surgery. (See Exhibit  
21

22  
23  
24 Discl. Bates No. 233; 07/16/13 I was told by Dr. Fisher, Dr. Komadina and Dr. Seljstat that I must always wear 100%  
25 UV protection sun glasses whenever I am outside. Tingley Initial Discl. Bates No. 231; 8/23/13 Refill drops. Tingley  
26 Initial Discl. Bates No. 229; 09/02/13 Please refill eye drops,, not even emailed by medical until 09/24/13 Tingley Initial  
27 Discl. Bates No. 222; 09/05/13 I'm completely out of Ketorolac Please , please re-fill. Tingley Initial Discl. Bates No.  
28 225; 09/09/13 Please re-fill eye drops Tingley Initial Discl. Bates No. 223; 10/09/13 Please re-fill eye drops Tingley  
Initial Discl. Bates No. 220; 11/05/13 Please re-fill eye drops. Tingley Initial Discl. Bates No. 212; 11/20/13 Please  
re-fill eye drops Tingley Initial Discl. Bates No. 210; 01/26/14 Please re-fill IBUs. Tingley Initial Discl. Bates No. 203;  
02/25/14 Please re-fill IBUs for eye pain. Tingley Initial Discl. Bates No. 202; 10/20/14 Please re-fill eye drops. Tingley  
Initial Discl. Bates No. 98; and 12/15/14 Please schedule me with a Dr. I have some questions about my right eye.  
Tingley Initial Discl. Bates No. 83.

14)

20. It is important to note that from 2008 until his surgery in 2014, the Plaintiff continually suffered from various symptoms, including headaches, obscured vision, and pain as a result of his untreated pterygium. (See allegations of fact in Second Amended Complaint in Doc. #56, which were supported by the Declaration of Adam Tingley on page 8 and Exhibit 14)).

21. The Plaintiff did not have another eye surgery for his Pterygium until February 19th of 2014, which was performed by Dr. Komadina in Reno, Nevada. (Exhibit 4 page 12 line 5) Dr. Komadina described the surgery as follows:

Q: Okay. And, just to back up for a moment, can you describe just very basically how you did the surgery on the plaintiff's eye on February 19th?

A: Sure. He had a very large recurrence that extended, as you can see on the circular picture again on February 20th, that extended not only to the center of his cornea but also beyond the center of his cornea, so that's why his vision was so poor. And so, I removed the pterygium off of the cornea and also then took it back onto the white part of the eye, or where the sclera is, the white part of the eye, and there's a tissue that covers it called conjunctiva and the pterygium extended on to that conjunctival area as well. And so, I removed it off of that area. It was a fairly -- you know, it was a large pterygium. It took, you know, as I remember this, it was almost two hours to remove all of this scar tissue off of his eye. We know historically that, if you only remove the pterygium from the cornea and on the white part of that eye and do nothing other than that, that the recurrence rate is extremely high particularly in a patient like Mr. Tingley, who's already had one, you know, prior surgery and had had this recurrence, that it probably is somewhere in the -- as the literature shows 50 to 60% recurrence rate, if you only do that part of the surgery. So, in addition to that, I applied mitomycin C, which is a chemotherapeutic agent, to the white part of the eye and you leave it on for two minutes and that kills the cells called fibroblast, which makes scar tissue. And you leave it on for two minutes, and then, you rinse it off the eye, and then, finally, the tissue graft is -- is positioned in the area where the defect is on the white part of the eye. The combination of doing those additional steps, the mitomycin C and the tissue graft, cuts the recurrence rate from 50

1 to 60% down to, currently in my practice, to about 6%. So, you know, it fairly  
2 dramatically cuts down recurrence rate on a pterygium.

3 Q: Okay. So, are you saying that, all of the things being equal, Mr. Tingley  
4 should have had -- the chance of a recurrence would have been 6% based on  
5 your experience in your practice?

6 A: Yes.

(Exhibit 4 at page 16 line 15)

7 22. After the second surgery, Dr. Komadina prescribed eye drops called  
8 "tobradex" essential to Plaintiff's successful recovery from the second surgery. At his  
9 deposition, Dr. Komadina further described tobradex as follows:

11 Q: Okay. Did you prescribe any postoperative medications for Mr. Tingley  
12 after the February 19 surgery?

13 A: I did.

14 Q: Okay. Do you recall what those medications were?

15 A: It was an antibiotic steroid medication called Tobradex. The purpose of  
16 that medication is to prevent postoperative infection and the steroidal  
17 component is to decrease postoperative inflammation.

18 Q: Okay. And just in layman's terms, what did those medications do after  
19 the surgery?

20 A: Well, the tobramycin component, the concept of using that is to try and  
21 prevent infection. There are sutures associated with the surgery that I did. If  
22 you look at my little drawing there on February 20th, we'll see that I've put in  
23 a tissue graft and that tissue graft is sewn into place with small dissolvable  
24 sutures that disappear over several weeks and those sutures can become  
25 infected because they're on the surface of the tissue graft and they can attract  
26 bacteria and can infect the graft. So, the point of the antibiotic component is  
27 to prevent the tissue graft from becoming infected, and then also, if you note  
28 in the circular area, which is the part of his cornea that I took the pterygium  
off, that can become infected as well. And in addition to that, the donor sites,  
all these places can become infected postoperatively. So, the idea behind  
using the antibiotic component is to try and decrease risk of postoperative  
infection in these three sites. The dexamethasone component to the  
Tobradex is a topical steroidal medication. It's a combo drug, so it's all in one  
bottle. And it's critical, in my estimation, for patients having had this surgery  
that we try and get their eye quieted down as quickly as possible with the  
steroidal medication so that they potentially don't form new scar tissue or  
recurrent pterygium. (Exhibit 4 page 15 line 8).

1 At his deposition, Dr. Komadina also emphasised that the medication he ordered for the  
2 Plaintiff post surgery was not difficult to obtain and are readily available at any pharmacy in  
3 Carson City. (Exhibit 4 page 24 line 7).

4  
5 23. After the February 19, 2014 surgery, Dr. Komadina provided the Plaintiff with  
6 small sample bottles of the prescribed tobradex medication, but these samples only lasted a  
7 few days after the surgery (See Exhibit 14).

8  
9 24. Dr. Komadina spoke with Sue Hoffman shortly after the February 19, 2014  
10 surgery and informed her of the importance that the Plaintiff receive his postoperative eye  
11 drops:  
12

13  
14 Q: Did you explain the need for postoperative medication to anyone from  
the Department of Corrections?

15 A: I did.

16 Q: Do you remember who?

17 A: I don't remember the nurse's name, but I wrote the prescription like --  
18 you know. And in the office typically, the guards take, you know, copies of  
19 our notes from any particular visit back to the medical dispensary. They have  
20 a form that I fill out as to what I think should be done and I indicated in those  
forms, which I do not have copies of. And also, when it became apparent  
21 that he wasn't getting his medications, I talked to one of the nursing staff and  
discussed it, you know, the importance of getting the medication, which  
apparently had become a problem.

22 Q: Can you explain what you mean by apparently it had become a problem?

23 A: Well, the patient indicated to me that he was not getting his medication,  
24 his postoperative medication, and as we were just discussing, it's critical in  
these patients that they receive that to decrease their postoperative risk of not  
only infection but also of recurrence. (Exhibit 4 page 18 line 16)

25 25. At the November 19, 2015 deposition of Corrections Officer Brandt Halling  
26 (Exhibit 11), Officer Halling testified that he was present and and heard the conversation  
27 between Dr. Komadina and Defendant Sue Hoffman that occurred shortly after the  
28

1 surgery. Halling testified as follows:

2 ...The doctor, I believe, got on the phone with Ms. Hoffman and was very  
3 adamant that that specific eye drop was the one that needed to be there for  
4 him because it was the one that would take care and keep the surgery or the  
5 eyes from lapsing back.

6 Q: When did this conversation occur?

7 A: In the operating room.

8 Q: So, just after Mr. Tingley received the surgery?

9 A: Yes, sir.

10 Q: And how do you know that Dr. Komadina was speaking to Ms. Hoffman?

11 A: Because I am the one that called her. (Exhibit 11 page 16 line 10).

12 26. Ms. Hoffman told the Plaintiff that it was not her job to personally provide the  
13 Plaintiff with eye drops. (See allegations of fact in Second Amended Complaint in Doc.  
14 #56, which were supported by the Declaration of Adam Tingley on page 8 Exhibit 14).

15 27. On a February 25, 2014 follow up visit by the Plaintiff shortly after the second  
16 surgery to Dr. Komadina, Dr. Komadina became aware that the Plaintiff had not been  
17 provided with tobradex by NDOC. Dr. Komadina then again called Ms. Hoffman to  
18 address the issue:

19 Q: Do you remember the contents of that conversation?

20 A: You know, that was the discussion about why, you know, it was now six  
21 days postoperative, he still had not received his medications, or had run out of  
22 them and there's issues about him getting more of the medication. And it  
23 wasn't -- I don't know. It was kind of a disturbing discussion to me because  
24 she indicated to me that I was supposed to provide all of his postoperative  
25 medication. And I told her that, you know, I had no, you know, license to be  
26 a dispensing pharmacy. And that I had some samples and which I gave him,  
27 but that, you know, we get very limited samples of pharmaceutical  
28 medications and she insisted that I provide the medication. I just indicated to  
her that that was really not in my purview and that really the correctional  
center was to provide the postoperative medication.

Q: So, this person that you spoke to knew that Mr. Tingley needed the  
postoperative medication?

A: I tried to make that clear to her that he did.

1 Q: And do you recall specifically what you told her?

2 A: I don't recall, you know. Other than knowing that, you know, I told her  
3 the importance of having the medications as we discussed earlier about  
4 preventing infection and recurrence. You know, I discussed that with her,  
5 but I didn't record any conversation, so I don't know exactly, you know, every  
6 single thing that was said other than the highlights that I just mentioned.

7 Q: Did the person you spoke to, as indicated in your notes, express any  
8 particular interest or sympathy or concern about Mr. Tingley's condition?

9 A: I don't think that we discussed that. She was fairly adamant that I was --  
10 you know, the thing that struck me that I remember about the conversation,  
11 you know, now that we're a year and a half later is that she was fairly adamant  
12 that I provide the medication for him. And I tried to explain to her that I  
13 don't, again, don't have a license to do such a thing. And to me, it's  
14 frustrating when the state is willing to provide care for a patient and including  
15 the cost of doing the surgery, and the medications are, in the scheme of  
16 things, relatively small expenses. And it didn't make sense to me that that  
17 they would go to the trouble and expense of providing surgical therapy to a  
18 patient, which costs thousands of dollars by the time you add in surgical fees  
19 and then anesthesia cost, the cost of having the surgery center and -- and yet,  
20 the thing that disturbed me was that they weren't willing to provide the  
21 medication for his postoperative care. (Exhibit 4 page 20 line 6)

22 28. As shown in Exhibit 10 at Tingley Initial Discl. Bates No. 000391, the first  
23 record of NDOC ordering postoperative tobradex eye drops for the Plaintiff after his  
24 February 19, 2014 surgery was on February 20, 2014, and he did not receive his  
25 tobradex drops until March 6, 2014, which was 15 days after the surgery. At his deposition,  
26 Dr. Komadina made clear that this was an unacceptable situation that increases the risk of  
27 recurrence:  
28

29 Q: Okay. What length of delay would be acceptable to go without receiving  
30 the eye drops postoperative?

31 A: You know, I think that that kind of a question assumes that there is any  
32 kind of safe delay and in my experience, there isn't such a thing. You know, I  
33 think that a patient should always have their postoperative medications and  
34 use them particularly in the early stages after such surgery. I think that it  
35 increases the risk of infection and recurrence and other problems. And so I  
36 don't know that there is such a thing as a safe period of time for patient not to  
37 do their medication. I mean that's the whole point of, you know, my



1 discussion with the nursing staff there and it's just -- I don't know, you know,  
2 as we discussed earlier I don't know why the state would fund surgery for a  
3 patient and then not provide something in the scheme of things is relatively  
4 low cost. So, I would say there is probably no safe period of time where the  
5 patient, you know, doesn't have to do the medication. If you're asking, could  
6 they do it, get away with not doing it? Well maybe, but I don't want the  
7 patient, particularly in a patient who's had a previous recurrence to have to try  
8 and figure that out. I mean I'm not sure why we would ever want a patient to  
9 do that. (Exhibit 4 at page 37 line 14)

10 29. According to the "Non-Formulary Drug Request" in Tingley Initial Discl.  
11 Bates No. 000398, the tobradex prescribed by Dr. Komadina was ordered on February 19,  
12 2014, but is marked that it was emailed in February 26, 2014, which is consistent with the  
13 Plaintiff's account relayed to Dr. Komadina that he did not receive the appropriate  
14 postoperative medication from NDOC after the February 19, 2014 surgery. *Id.*

15 30. Subsequent to the February 19, 2014 surgery, the Plaintiff plead with Ms.  
16 McCullough several times requesting the required eye drops. (See allegations of fact in  
17 Second Amended Complaint in Doc. #56, which were supported by the Declaration of  
18 Adam Tingley on page 8 and Exhibit 14). At his Deposition, Dr. Komadina also verified  
19 that his medical for the Plaintiff indicate that his assistant spoke with "Kaye" at Warm  
20 Springs about the Plaintiff's postoperative eye drops as follows:  
21

22 Q: Okay. I would like to refer you next to what's been marked in Exhibit 1  
23 as Bates Number 303. And Dr. Komadina, this document is your records  
24 from Mr. Tingley's medical file dated Tuesday, May 27th, 2014, is it not?

25 A: That's correct.

26 Q: Okay. I'd like to direct you to the notes at the bottom left of the page.  
27 I'd ask you to review that. Just tell me what it says.

28 A: Again, that's the -- from Julie Mendi, my ophthalmic technician that she  
spoke with Kaye at Warm Springs Correctional Center that we had, as I  
mentioned previously, that if we had samples, we try to get the patient  
samples. He indicated that he haven't had any drops for three weeks. And



1 we had a sample of Durezol, which is a type of steroidal medication and that I  
2 had given him samples of that medication to be used in his left eye. (Exhibit 4  
3 page 25 line 10)

4 It is reasonable to conclude that the "Kaye" referred to above is Defendant Kary McCullah,  
5 as in Exhibit I to the Defendant's Motion, which is the Declaration of Ms. McCullah, she  
6 recalls the same conversation in May of 2014. Thus, in May of 2014, months after the  
7 Plaintiff had his February 19, 2014 surgery, the Plaintiff was still having difficulties getting  
8 eye drops in accordance with Dr. Komadina's orders.  
9

10  
11 31. Subsequent to the second surgery, the Plaintiff plead with John B. Perry several  
12 times requesting the required eye drops. Mr. Perry refused to provide the Plaintiff with the  
13 eye drops that Dr. Komadina prescribed in a timely manner, stating words equivalent to,  
14 "You are just an inmate, you will get your eye drops when you get them." (See allegations of  
15 fact in Second Amended Complaint in Doc. #56, which were supported by the Declaration  
16 of Adam Tingley on page 8 Exhibit 14).  
17

18  
19 32. NDOC did not provide the Plaintiff with eye drops in a timely manner, and the  
20 Plaintiff has had another recurrence of pterygium. Dr Komadina testified about the  
21 recurrence as follows:  
22

23 Q: And could you describe for me generally what this document shows?

24 A: Well, this document is postoperative visit from his surgery on February  
25 19th. He is now almost two months after his surgery. He had had -- he  
26 indicated to Julie, my ophthalmic technician, that he had not received neither  
27 of the two drops that I'd asked them to get for two weeks. And I noted on  
28 his exam that he was starting to get a small recurrence of his pterygium on the  
nasal part of his cornea. And, you know, I drew that little drawing there. Overall, he was doing reasonably well considering that he was 2400 postoperatively, but his vision was 20/50 at that time. And, you know, I had noted in the assessment part that, you know, I felt that he was starting to get

1 this recurrence because he was not using medications as prescribed. (Exhibit 4  
2 at page 24 line 20)

3  
4 33. Plaintiff continues to suffer from the symptoms associated with pterygium as a  
5 result of the delay and/or denial of his second post-surgery treatment. Plaintiff suffers  
6 from ongoing injury and severe emotional and physical pain caused by failure of this  
7 surgery, including but not limited to loss of vision, inflammation, tearing, dry and itchy eyes,  
8 headaches. (See allegations of fact in Second Amended Complaint in Doc. #56, which were  
9 supported by the Declaration of Adam Tingley on page 8 Exhibit 14).  
10  
11

### 12 **III. ARGUMENTS IN MOTION**

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14 34. The Defendant's Motion makes the following arguments: (1) that the  
15 applicable statute of limitations has run on the Plaintiffs claims (Motion at page 7 line 25);  
16 (2) that the Plaintiff failed to exhaust his administrative remedies under the requirements of  
17 the Prison Litigation Reform Act ("PLRA")(Motion at page 9 line 6); (3) that the  
18 Defendants were not deliberately indifferent to the Plaintiff's serious medical needs (Motion  
19 at page 11 line 9) and (4) that the Defendants are entitled to qualified immunity as the  
20 Defendants reasonably believed that their conduct was lawful. (Motion at pages 15 line 18)  
21  
22 The Plaintiff will respond to each of these arguments in turn below.  
23

24 **The Statute of Limitations should be equitably tolled for the Plaintiff's**  
25 **pre-September 2012 claims**  
26

27 35. The Defendants argue that the Plaintiff is limited to those deliberate  
28

1 indifference claims that occurred between September 18, 2012, and September 18, 2014 and  
2 that allegations relating to due process violations prior to September 30, 2011, fall outside  
3 the two year statute of limitations and must be dismissed. (Motion at page 9 line 1).  
4 Because all of the Plaintiff's claims related to Defendant's Hoffman, Perry, and McCullah  
5 fall within the period of limitation, the analysis below applies only to the Plaintiff's claims  
6 against Bannister.  
7

8  
9 36. Under federal law, a claim accrues when the plaintiff knows or has reason to  
10 know of the injury which is the basis of the action. *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th  
11 Cir. 1999). However, where the federal courts borrow the state statute of limitations, they  
12 also borrow the forum state's tolling rules. *Id.* at 992. In Nevada, the two year tort claim  
13 limitation in NRS 11.190(4)(e) may be equitably tolled according to the following criteria:  
14 (1) the diligence of the claimant; (2) the claimant's knowledge of the relevant facts; (3) the  
15 claimant's reliance on authoritative statements that misled the claimant about the nature of  
16 the claimant's rights; (4) any deception or false assurances on the part of party against  
17 whom the claim is made; (5) the prejudice to the defendant that would actually result from  
18 delay during the time the limitations period is tolled; and (6) any other equitable  
19 considerations appropriate in the particular case. *Wisenbaker v. Farwell*, 341 F. Supp. 2d 1160  
20 (D. Nev. 2004) citing *Copeland v. Desert Inn Hotel*, 99 Nev. 823 (Nev. 1983).  
21  
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26 37. The record above shows that the Plaintiff was continually and diligently  
27 requesting treatment for his condition from NDOC officials, including Dr. Bannister, by  
28

1 filing kites and requesting care from NDOC medical providers. The record also indicates  
2 that the Plaintiff's knowledge of what caused the failure of his first surgery in 2006 by Dr.  
3 Fischer was not clear until he consulted with Dr. Komadina about the critical importance of  
4 postoperative medication. (See Exhibit 14) The record indicates that Dr. Bannister delayed  
5 and/or denied the Plaintiff's pleas for help on a continuing and ongoing basis since 2004.  
6  
7

8 **The Plaintiff complied with the exhaustion requirements of the PLRA, under NDOC**  
9 **rules. If the Plaintiff had filed multiple grievances for the same medical condition he**  
10 **could have been subject to discipline**  
11

12 38. The Defendants argue that because Plaintiff's second eye surgery was in  
13 February 2014, he was required to file a grievance related to the eye drop issue, and that he  
14 has not done so. (Motion at page 10 line 12) Attached to the Defendants Motion as  
15 Exhibit K are the grievance papers the Plaintiff filed with NDOC related to the issue in this  
16 case, i.e. that the Plaintiff was not receiving adequate medical care related to the pterygium  
17 in his left eye, which the Defendants impliedly concede, comply with the exhaustion  
18 requirements of the PLRA in the Defendant's Motion at page 10 line 8.  
19  
20  
21

22 39. Under the PLRA an action shall be brought with respect to prison conditions  
23 may not be brought until administrative remedies as are available are exhausted. *McCarthy v.*  
24 *Madigan*, 503 U.S. 140, 144 (1992). An inmate's compliance with the PLRA exhaustion  
25 requirement as to some, but not all claims does not warrant dismissal of the entire action.  
26 *Lira v. Herrera*, 427 F.3d 1164, 1175 (9th Cir. 2005). However, the Plaintiff's filed grievance  
27  
28

1 in Exhibit K to the Defendants Motion is sufficient in scope to include the Plaintiff's claims  
2 related to the Defendant's failure to provide the plaintiff with postoperative eye drops as  
3 recommended by Dr. Komadina. This is the case because the subject of the grievance, i.e.  
4 lack of adequate medical care for the Plaintiff's pterygium, was ongoing at the time the  
5 grievance process was being conducted. For example, the Plaintiff's Second Level  
6 Grievance at TINGLEY 358: DEF MSJ EXH K - 001, was filed on February 27, 2014,  
7 and states: "Dr. Komadina did do surgery. This should have been done over 7 years ago! By  
8 neglecting to properly treat me, by not getting me to the the first surgery in a timely manner  
9 and doing nothing you've kept me in severe pain and suffering." Defendant's Exhibit K  
10 shows that the Plaintiff received the response to the Second Level Grievance on April 22,  
11 2014. It is unreasonable to expect that the Plaintiff initiate a new grievance procedure on  
12 each individual instance of a violation of his constitutional rights as a whole.  
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18 40. The Plaintiff's Second Amended Complaint alleged a single cause of action, i.e.  
19 violation of the Plaintiff's right to be free from cruel and unusual punishment. (Doc. #56  
20 page 5 line 12). There is a single medical issue in this case, i.e. neglect of proper treatment  
21 for the Plaintiff's pterygium, which the Defendants impliedly admit the Plaintiff complained  
22 about and grieved in accordance and compliance with the PLRA and Administrative  
23 Regulation 740, which is attached to the Defendant's Motion as Exhibit M. Nothing in the  
24 PLRA imposes a name all defendants requirement for grievances *Jones v. Bock*, 549 U.S. 199  
25 (U.S. 2007). The level of detail necessary in a grievance to comply with the grievance  
26  
27  
28

1 procedures will vary from system to system and claim to claim and it is the prison's  
2 requirements, and not the PLRA, that define the boundaries of proper exhaustion. *Id.* In  
3 fact, according to Administrative Regulation 740.09(2)(B), it is considered “abuse of the  
4 inmate grievance procedure” where an inmate files a grievance that contains “Specific  
5 claims or incidents previously filed by the same inmate.” Further, according to  
6 Administrative Regulation 740.09(2)(F), it is considered “abuse of the inmate grievance  
7 procedure” where an inmate files a grievance that contains “two or more appropriate  
8 issues.” Hence, if the Plaintiff had done what the Defendants now suggest in the Motion,  
9 i.e. file another grievance claim related to lack of treatment for his pterygium, he could have  
10 been subject to discipline under Administrative Regulation 740.09(2).

11 **The record is clear that the Defendants had knowledge of the Plaintiff's condition**  
12 **and unreasonably delayed or denied him adequate medical care**

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18 41. The Defendants argue that it cannot be said that Dr. Bannister was deliberately  
19 indifferent to Plaintiff's medical needs because there is no evidence that Dr. Bannister was  
20 aware of the issue. (Motion at page 13 line 23). As stated in Dr. Bannister's Declaration,  
21 which is attached to the Defendant's Motion as Exhibit C, Dr. Bannister was the Medical  
22 Director for NDOC until his retirement in May 2013. Exhibit 12, attached hereto, are the  
23 Dr. Bannister's responses to Interrogatories 10-13. When asked in Interrogatory No. 10  
24 what specific dates since 2004 did he served on the UR Panel, Bannister provided the  
25 following response:  
26  
27  
28

1 INTERROGATORY NO .10:

2 Have you ever served on the Utilization Review ("UR") panel? If so, please detail the  
3 times you served on the UR panel since January 1, 2004.

4 RESPONSE TO INTERROGATORY NO. 10

5 Objection, overly broad as the request seeks information over an 11 year period.  
6 Notwithstanding this objection and without waiving it, Dr. Bannister states: Yes. I  
7 have served on the UR panel as the Medical Director. However, I do not recall the  
8 specific dates.

9 42. Exhibit 13, attached hereto, are the Interrogatory Responses of Dr. Bannister  
10 to Interrogatories 2-9. In response to Interrogatory No. 2, Bannister states that he was  
11 Medical Director of NDOC from 2006 to 2013.

12 43. At the deposition of Dr. Gedney, she verified that Dr. Bannister , if he was in  
13 the UR Panel, would have seen the requests Dr. Gedney made on the Plaintiff's behalf:

14 Q: Okay. But if Dr. Bannister were on the UR panel at a time between 2004  
15 and 2014, he would have seen your request to the UR panel on behalf of Mr.  
16 Tingley, would he not?

17 A: If he was on the panel at the time those requests went in, yes. (Exhibit 7  
18 page 18 line 21).

19 44. At her deposition, Dr. Gedney also verified that Dr. Bannister was on the UR  
20 Panel (Exhibit 7 page 34 line 7). Also, the affidavit of the Plaintiff in Exhibit 14 states that  
21 Dr. Gedney told the Plaintiff that it was Dr. Bannister that was denying his requests for  
22 surgery.

23 45. At a minimum, a genuine issue of material fact exists as to whether Dr.  
24 Bannister was serving on the UR Panel at the time the UR Panel was evaluating the  
25 Plaintiff's multiple requests to have surgery in his eye as described above. The record  
26 detailed above shows that while the UR panel continually failed to approve and/or deny the  
27  
28



1 Plaintiff treatment for his condition, the Plaintiff was forced to endure years of pain and  
2 loss of vision in his eye. Where a prisoner alleged that an almost two-month delay in  
3 receiving any treatment for a fractured thumb, and a nineteen-month delay in being seen by  
4 a hand specialist, had caused pain and the diminished use of his hand because the  
5 fracture had healed improperly, this was sufficient to state a claim of deliberate  
6 indifference to serious medical needs. *Jett v. Penner*, 439 F.3d 1091, 1097 (9th Cir. Cal.  
7 2006).

8  
9  
10  
11 46. In her Declaration, attached to the Motion as Exhibit E, Ms. Hoffman claims  
12 that she obtained the generic “equivalent” to tobradex, “neomycin” shortly after the  
13 surgery. (Motion at page 14 line 16). There is no evidence presented in the Motion on or  
14 in the record that neomycin is equivalent to tobradex. According to the testimony of Dr.  
15 Komadina, tobradex was essential to the Plaintiff’s chances of a successful surgery (Exhibit  
16 4 page 15 line 18). The Defendants have offered no expert opinion to contradict Dr.  
17 Komadina’s testimony that tobradex was essential to the Plaintiff’s recovery from eye  
18 surgery. The Defendants have also offered no expert opinion that neomycin is actually  
19 equivalent to tobradex.  
20  
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22

23 47. The Defendants also argue that there is no evidence to demonstrate  
24 that Mr. Perry, Ms. Hoffman, or Ms. McCullah were deliberately indifferent to Plaintiff’s  
25 medical care. (Motion at page 14 line 9) The evidence detailed above, including the  
26 testimony of Dr. Komadina at his deposition, that shows that the response of the Ms.  
27  
28

1 Hoffman to the requests of the Plaintiff and of Dr. Komadina showed that the Ms.  
2 Hoffman had knowledge that if the Plaintiff were denied tobradex, that it was likely that the  
3 surgery on his eye would fail as a result, that she did in fact deny the Plaintiff the tobradex  
4 that Dr. Komadina prescribed, and that the Plaintiff has had a recurrence as a result. The  
5 Affidavit of the Plaintiff in Exhibit 14 also shows that he told Ms. Hoffman, Ms.  
6 McCullough, and Mr. Perry that he needed the eye drops and that each of these Defendants  
7 were indifferent to his requests. In other words, a genuine issue of material fact exists as to  
8 whether the account of the Plaintiff and Dr. Komadina as to the deprivation of medical  
9 case is correct, or the Defendant's version of events is correct.  
10  
11  
12

13  
14 48. For each named Defendant, the Plaintiff has shown that they had knowledge  
15 of the condition, that a serious medical need existed, and demonstrated that the Defendants  
16 failure to treat the Plaintiff's condition has resulted in further significant injury and the  
17 unnecessary and wanton infliction of pain, as the Plaintiff was forced to wait years for  
18 surgery and the Plaintiff's eye condition has returned as the result of the Defendant's failure  
19 to provide the Plaintiff with postoperative eye drops. *Estelle v. Gamble*, 429 U.S. 97, 106  
20 (1976). The Plaintiff has also shown that the Defendant's response to the need was  
21 deliberately indifferent by showing that Bannister delayed and/or denied surgery for many  
22 years and that Hoffman, Perry, and McCullah failed to respond to the medical needs of the  
23 Plaintiff - and the Plaintiff suffered and continues to suffer harm as a result of the  
24 Defendant's failure to provide the Plaintiff with adequate medical care. *Jett v. Penner*, 439  
25  
26  
27  
28

1 F.3d 1091, (9th Cir. Cal. 2006).

2  
3 **The Defendants are not immune from acts that violate clearly established**  
4 **Constitutional rights**

5 49. The Defendants argue in the Motion that qualified immunity shields the  
6 Defendants from liability because qualified immunity protects state officials sued in their  
7 individual capacity for damages unless the conduct complained of violates a clearly  
8 established constitutional or statutory right of which a reasonable person would know,  
9  
10 citing *Jackson v. City of Bremerton*, 268 F.3d 647, 650 (9th Cir 1991).

12 50. Government officials performing discretionary functions are entitled to a  
13 qualified immunity, shielding them from civil damages liability as long as their actions could  
14 reasonably have been thought consistent with the rights they are alleged to have violated.  
15  
16 *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). A qualified immunity  
17 analysis on a motion for summary judgment starts with the threshold question of whether,  
18 based upon the facts taken in the light most favorable to the party asserting the injury, did  
19 the conduct violate a constitutional right. *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir.  
20 Wash. 2001). Whether the defendant violated a constitutional right and whether the right  
21 was clearly established at the time of the violation are pure legal questions for the  
22  
23 court. *Serrano v. Francis*, 345 F.3d 1071, 1080 (9th Cir. 2003)

24  
25  
26 51. It is well established that deliberate indifference to a prisoner's serious illness or  
27 injury states a cause of action under 42 U.S.C. Section 1983. *Estelle v. Gamble*, 429 U.S. 97,  
28

1 105 (1976). It is also well established that denial of medical attention to prisoners  
2 constitutes a violation if the denial amounts to deliberate indifference to serious medical  
3 needs of the prisoners.” *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986). It is  
4 clear from the facts presented above that denial of medical of care for an extended period  
5 of time was serious enough to the Plaintiff’s clearly established 8th Amendment  
6 constitutional right to be free from cruel and unusual punishment was violated by the  
7 failure of the Defendants to provide care to the Plaintiff and the Defendant’s deliberate  
8 indifference to the Plaintiff’s serious medical needs. In *Hunt v. Dental Dep’t*, 865 F.2d 198,  
9 200-01 (9th Cir. 1989), the Ninth Circuit has held that a mere three-month delay in  
10 replacing dentures was causing pain this was sufficient to state a claim of deliberate  
11 indifference to serious medical needs. The record in this matter shows that the Plaintiff  
12 was forced to wait years to receive surgery for his condition, and that during this time  
13 period the Plaintiff was experiencing tremendous suffering. The right to reasonable access  
14 to treatment for a condition that was rendering the Plaintiff blind and in varying states of  
15 agony for years was clearly established at the time of the violation(s) by the Defendants.  
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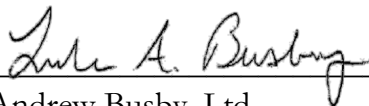
22 52. There is no reasonable argument at hand that the Defendants did not know  
23 that such an occurrence was unlawful and that the Plaintiff’s Constitutional rights were not  
24 violated based on the facts and evidence presented above.  
25

26 ///

27 ///

28 ///

RESPECTFULLY submitted this February 20, 2016.

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this Thursday, February 20, 2016, I electronically transmitted the foregoing pleading to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel registered to receive Electronic Filings and/or mailed the foregoing pleading via US Mail postage prepaid to the following persons:

Benjamin R. Johnson  
Deputy Attorney General  
State of Nevada - Office of the Attorney General  
Public Safety Division - Bureau of Litigation  
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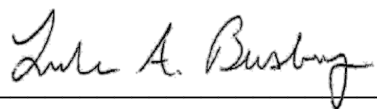
By:   
Luke Busby

Exhibit List

1. Answer to Second Amended Complaint
2. Description and Picture of Ptygerium
3. Komadina Expert Disclosure
4. November 4, 2015 Deposition of Dr. Komadina
5. Physician's Orders (Confidential)
6. UR Panel Docs (Confidential)
7. November 19, 2015 Deposition of Dr. Gedney
8. Dr. Fischer Medical Records (Confidential)
9. Kites (Confidential)
10. Prescription Information (Confidential)
11. November 19, 2014 Halling Deposition
12. Bannister Response to Plaintiff's Interrogatories 10-13
13. Bannister Response to Plaintiff's Interrogatories 1-9
14. Affidavit of Adam Tingley